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# In the Supreme Court of the United States.

No. [redacted] Original, October Term, 1928. 976

THE STATE OF COLORADO, *Complainant*,

*vs.*

THE STATE OF KANSAS and THE FINNEY COUNTY WATER USERS' ASSOCIATION, a Corporation, *Defendants*.

## BRIEF FOR THE STATE OF KANSAS AND THE FINNEY COUNTY WATER USERS' ASSOCIATION IN SUPPORT OF THEIR MOTION TO REQUIRE CERTAIN COLORADO IRRIGATORS TO BE MADE DEFENDANTS HEREIN, ETC.

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# In the Supreme Court of the United States.

**No. 14 Original, October Term, 1928.**

THE STATE OF COLORADO, *Complainant*,

*vs.*

THE STATE OF KANSAS and THE FINNEY COUNTY WATER USERS' ASSOCIATION, a Corporation, *Defendants.*

## BRIEF FOR THE STATE OF KANSAS AND THE FINNEY COUNTY WATER USERS' ASSOCIATION IN SUPPORT OF THEIR MOTION TO REQUIRE CERTAIN COLORADO IRRIGATORS TO BE MADE DEFENDANTS HEREIN, ETC.

## STATEMENT.

The state of Kansas and the Finney County Water Users' Association have filed a joint motion herein, with reference to 166 persons alleged in the answers of the two defendants to be irrigators in Colorado and to have been taking water and to threaten to continue to take water for irrigation of lands in Colorado from the Arkansas river and its tributaries in that state, to the wrongful injury and damage, among others, of the defendant, the Finney County Water Users' Association, and certain other irrigators in Kansas who are alleged in the Answers to have rights to take water for irrigation of lands from the Arkansas river in Kansas. The motion in its prayer follows in substance the prayer in the separate answers of the defendants; that is, that the said Colorado irrigators should be required by order of this court, in the alternative, either to file

a written statement in this case to the effect that the state of Colorado represents each of them respectively in all of the issues of this case, the same as if they were parties herein, and that they will be bound by any orders or decrees of this court in this case the same as if they were parties herein, or else that the said parties in Colorado be made parties defendant to this suit, and in such contingency that this court issue subpœnas or other proper process to each of said Colorado parties summoning each of them to appear herein and present their answers, if any, to the claim for affirmative relief of the state of Kansas hereinbefore set forth.

The prayer of the answer of the state of Kansas asks, among other things, that this court by its decree will protect and quiet the rights of citizens and residents of Kansas to their appropriations of water in the Arkansas river for irrigation of lands in Kansas as against the acts of parties in Colorado who have later rights, or no rights, to take water from the Arkansas river, or its tributaries, in Colorado, for the purpose of irrigation, and that it will protect and quiet the rights of the defendant, the Finney County Water Users' Association to its appropriating of water from the Arkansas river in Kearny county, Kansas, for agricultural irrigation as against not only the state of Colorado but also the said irrigators in Colorado which are above referred to.

See Answer of the state of Kansas, pp. 46-48.

The answer of the Finney County Water Users' Association asks, among other things, for relief by protection of its rights to take water from the Arkansas river in Kansas for irrigation against the said irrigators in Colorado. (Answer of said defendant, pp. 24, 25.)

The state of Kansas makes allegations asking affirmative relief against said irrigators in Colorado in the twenty-second paragraph of its answer, pp. 30-46. It makes allegations concerning the two suits brought by the Finney County Water Users' Association, one

against the Graham Ditch Company et al., and the other against the Coler Ditch and Reservoir Company et al., in the United States district court for the district of Colorado. (pp. 40-46, answer o the state of Kansas.)

There are 166 of these defendants in those two last named cases, the names of which are set out in said answer at the place referred to. Of these, one hundred and seventeen are individuals, three are irrigation districts under the laws of Colorado, one a town, one a city in that state, and forty-four are corporations. These are alleged to be citizens or residents of Colorado and the answer states that these Colorado irrigators have been taking and that they threaten to take water from the Arkansas river and its tributaries in Colorado, and among other things, that the Finney County Water Users' Association and the owners of twelve other ditches in Kansas, constructed and which have been used to take water from the Arkansas river for irrigation of lands in Kansas, the intake of one of which, however, is in Colorado about 2½ miles west of the Kansas line, have prior appropriation righths to the taking and use for irrigation of the water which has been taken, and is threatened to be taken as aforesaid, in Colorado, by the 166 Colorado parties referred to.

The names of the Kansas ditches, other than that of the Finney County Water Users' Association, with the exception of two which are not named, are set out at pages 33-35 of the answer of the state of Kansas. The names of such ditches are: Frontier ditch, Alamo ditch, Fort Aubrey ditch, Amazon ditch, South Side ditch, Great Eastern ditch, Garden City ditch, Eureka ditch, Taylor's South Side ditch, West Kansas flood ditch.

There are two of the Kansas ditches in question the names of which are not given in the answer of the state of Kansas.

The answer of the state of Kansas alleges that the Finney County Water Users' Association and the owners of the other Kansas ditches referred to have superior rights of appropriation of said water to the claims of the said parties in Colorado.

It is also alleged in said answer that the acts of said Colorado parties referred to have been with the permission and aid of the state of Colorado and with its purported authority (p. 37, separate answer of the state of Kansas).

In the answer of the Finey County Water Users' Association it alleges at paragraph eleventh, p. 11; that it has prior rights to said water against the defendants in its two suits brought in the United States district court in Colorado. Further allegations on this point are made in paragraph twelfth, pp. 12-14, *id.*; paragraph fourteenth, pp. 14 and 15, *id.*; and paragraph twenty-second, pp. 20-24, *id.* This answer adopts by reference the allegations in subdivision *k*, paragraph twenty-second, pp. 40-46, of the answer of the state of Kansas, wherein are set out the names of said Colorado irrigators.

In each of the answers it is alleged that the Finney County Water Users' Association has prior rights to the use of said water for irrigation of said lands over said irrigators in Colorado, and that such rights are the private rights of the Finney County Water Users' Association. In the answer of the state of Kansas similar allegations are made with reference to the owners of the other Kansas irrigating ditches mentioned.

Statements in the pleadings specifying or to the effect that there are controversies as to priorities of water appropriation rights, which controversies vary in regard to the facts and the times of the complaints, are set out in the pleadings at the following named paragraphs and pages:

In the bill of complaint of Colorado, paragraph twelfth, pages

29-38; paragraph fourteenth, pages 35, 36; paragraph nineteenth, page 46, subdivision *f*, page 46, subdivision *i*, page 47.

In the answer of the state of Kansas, paragraph eleventh, page 14; paragraph twelfth, page 17; paragraph fourteenth, page 21; paragraph seventeenth, page 26; paragraph twenty-second, pages 37-39, 44-46.

In the answer of the Finney County Water Users' Association, paragraph eleventh, page 11; paragraph twelfth, pages 12, 13; paragraph twenty-second, pages 22-24.

The motion in question is made on the ground that the controversies between the Finney County Water Users' Association and the other owners of Kansas irrigating ditches on the one hand, and said Colorado irrigators on the other hand, are as to private and several priorities and that owing to the number of the Colorado irrigators and the differences in times of the beginning of their claims, there are many separate controversies as to priorities between the Finney County Water Users' Association, and the other Kansas ditch owners, respectively, and those Colorado irrigators, and that as to such controversies the Colorado irrigators, unless they be required to file a statement, as above indicated, or be made parties to this suit, will not be bound by the orders or decrees in this suit; that as to times of asserted priorities, there is not a general or common claim or defense of citizens or residents of Colorado on which the state of Colorado might represent such parties in this suit, but there are many separate and various claims or defenses.

## POINTS AND AUTHORITIES.

### I.

The state of Colorado represents its citizens or residents, irrigators in Colorado as *parens patriæ* only in matters of common interest to such irrigators.

*New Hampshire v. Louisiana* and *New York v. Louisiana*, 108 U. S. 76; 27 L. Ed. 656.

*Louisiana v. Texas*, 176 U. S. 1, 16; 44 L. Ed. 347.

*Missouri v. Illinois*, 180 U. S. 208, 234, 235, 240; 45 L. Ed. 497, 509, 510, 512.

*Kansas v. United States*, 204 U. S. 331; 51 L. Ed. 510.

*Oklahoma v. Atchison, Topeka & Santa Fe Ry. Co.*, 220 U. S. 277; 65 L. Ed. 465.

*Massachusetts v. Mellon*, 262 U. S. 447, 481, 482; 67 L. Ed. 1078.

*North Dakota v. Minnesota*, 263 U. S. 365, 374-376; 68 L. Ed. 342, 345, 346.

### II.

The state of Colorado does not represent its citizens or residents, irrigators in Colorado, on questions of priority of appropriation of water dependent on different facts.

*California v. Southern Pacific Railroad Company*, 157 U. S. 229, 256; 39 L. Ed. 683.

*New Orleans Water Works Company v. New Orleans*, 164 U. S. 471, 480; 41 L. Ed. 518, 523.

*Minnesota v. Northern Securities Company*, 184 U. S. 199, 246, 247; 46 L. Ed. 499, 520.

*Pennsylvania v. West Virginia* and *Ohio v. West Virginia*, 262 U. S. 553, 595, 616, 617; 67 L. Ed. 1117, 1131, 1140, 1141.

### III.

In the case of *Wyoming v. Colorado*, the irrigators in Wyoming were affected in the same way. Their interests were in common and Wyoming properly represented them.

*Wyoming v. Colorado*, 259 U. S. 419; 66 L. Ed. 999.

## ARGUMENT.

There are two aspects of the claims and of the duties of the 166 Colorado irrigators referred to. So far as the claims and the conduct of the Colorado irrigators are in common with all of the residents or citizens of Colorado who take water from the Arkansas river or its tributaries in Colorado for the irrigation of land in that state it may be conceded that Colorado represents those irrigators in this case and that they will be bound by any orders or decrees made in this case. With respect, however, to the controversies as to priorities in claims or rights of water appropriation between the Finney County Water Users' Association and the owners of other Kansas ditches who take water for the purpose of irrigating land from the Arkansas river in Kansas, and the 166 persons referred to who take water from the Arkansas river or its tributaries in Colorado for the purpose of irrigating land in that state, the controversies necessarily relate to different times of initiation of claims of the Colorado irrigators; the evidence must vary and there is nothing in common between the Colorado irrigators, and the controversies being of a private and several character, the state of Colorado cannot be deemed to represent them so that they will be bound by any orders or decrees in this case.

Equity rule No. 38 provides: "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."

The questions of priorities are not of common or general interest. They are specific and separate as between the Finney County Water Users' Association and the owners of the other Kansas ditches and each of the Colorado irrigators referred to.

On these questions of priorities the state of Colorado does not represent the Colorado irrigators as *parens patriæ*, for the same reason that one party cannot represent others under equity rule No. 38; that is, the questions are not of common and general interest, but are of private, separate and varying property rights.

*New Hampshire v. Louisiana* and *New York v. Louisiana*, 108 U. S. 76; 27 L. Ed. 656.

*Louisiana v. Texas*, 176 U. S. 1, 16; 44 L. Ed. 347.

*Missouri v. Illinois*, 180 U. S. 208, 234, 235, 240; 45 L. Ed. 497, 509, 510, 512.

*Kansas v. United States*, 204 U. S. 331; 51 L. Ed. 510.

*Oklahoma v. Atchison, Topeka & Santa Fe Ry. Co.*, 220 U. S. 277; 65 L. Ed. 465.

*Massachusetts v. Mellon*, 262 U. S. 447, 481, 482; 67 L. Ed. 1078.

*North Dakota v. Minnesota*, 263 U. S. 365, 374-376; 68 L. Ed. 342, 345, 346.

We do not contend that this court does not have jurisdiction in this original suit to pass upon the relative claims for appropriations based upon varying facts of irrigators in Kansas and in Colorado respectively. There are broad and general questions as to the use of water in the Arkansas river and of water in its tributaries in Colorado, on which each state represents its citizens and residents, which affect all of the irrigators in each of those states and which cannot be properly disposed of without passing upon the relative and varying claims of these irrigators. This court, having jurisdiction of the general questions between the states which affect these irrigators, should, in order to give adequate relief in the case, pass upon the questions of priorities as between these irrigators. Our purpose in citing the foregoing cases on the question of jurisdiction of this court in original suits brought by states is only to support our position that the state of Colorado does not represent its irrigators upon these private and varying questions, and therefore, they should be made parties defendant in this suit.

Under equity rule No. 37 these Colorado irrigators may be parties because their presence is "necessary . . . . to a complete determination of the cause."

On these questions of priorities the Colorado irrigators are indispensable parties and without their being made parties to the suit or their filing the written statement mentioned, they would not be bound by the orders or decrees so far as the same would relate to private priorities dependent on different facts.

In the case of *California v. Southern Pacific Railroad Company*, 157 U. S. 229, 256, 39 L. Ed. 683, the state of California brought a suit, asserting title to some land as having been under navigable water. The city of Oakland and the Oakland Water Front Company each asserted some rights to the land in controversy. It was held that they were indispensable parties.

In the case of *New Orleans Water Works Company v. New Orleans*, 164 U. S. 471, 480; 41 L. Ed. 518, 523, the waterworks company brought a suit asserting the exclusive right under an ordinance of New Orleans to furnish water to supply the city and its inhabitants. Other parties had been granted, by ordinance of the city, the privilege to lay pipes in its streets for the purpose of conveying water to their respective premises from the Mississippi river. They were held to be indispensable parties.

In the case of *Minnesota v. Northern Securities Company*, 184 U. S. 199, 246, 247; 46 L. Ed. 499, 520, the state of Minnesota brought a suit to prevent by injunction a corporation, organized under the laws of another state, from obtaining and exercising ownership of stock in order to control two competing railroad corporations of Minnesota. It was held that those two railroad corporations were indispensable parties.

In the cases of *Pennsylvania v. West Virginia* and *Ohio v. West Virginia*, 262 U. S. 553, 595, 616, 617; 67 L. Ed. 1117, 1131, 1140, 1141, the commonwealth of Pennsylvania and the state of Ohio brought a suit in this court to enjoin the state of West Virginia "from enforcing a statute designed to preserve natural gas produced in the latter state for use of its own citizens." Mr. Justice Brandeis, in a dissenting opinion, 262 U. S. 616, 617, considered that there was a lack of necessary parties, because twelve exporting companies, having plants and pipe lines located in West Virginia, some of whose pipe lines extended into the territory of the complaining states, and which exported gas to Pennsylvania and Ohio, and fifty-five companies having gas pipe lines in West Virginia and which delivered in that state gas to exporting companies, destined to be transported to the territory of one of the complaining states, were not made parties, and that they were not represented by either of the plaintiffs or by the defendant.

The court held, opinion by Mr. Justice Van Devanter, that the presence of those companies in this suit was not essential. The opinion stated:

> "The third question is whether the requisite parties have been brought into the suits. It is objected that the pipe line companies have not been brought in. But there is nothing which makes their presence essential. The complainant states make no complaint and seek no relief against them. They are supplying gas in those states and evidently will continue to do so, if not restrained or prevented by the defendant state. It is only with her that the complainant states are in controversy. It also is objected that the consumers in the defendant state who will be benefited if the act is enforced have no representation in the suits. But this is a misconception. They are represented by that state, and there is nothing in the situation requiring that they be specially represented or brought in. With equal basis it could be objected in a suit to prevent the enforcement of a

statute reducing railroad freight rates, or in one to prevent the enforcement of a municipal ordinance reducing telephone or electric light rates, that shippers or users who would be benefited by the reduction must be specially represented or brought in. Such an objection would, of course, be untenable; and so of the objection here." (262 U. S. l. c. 595.)

In this case the state of Kansas and The Finney County Water Users' Association seek affirmative relief against the Colorado irrigators. The state of Kansas charges that those parties have taken and threaten to take water from the Arkansas river and its tributaries in Colorado to the injury, not only generally of its citizens and residents of Kansas in the Arkansas valley, but also in violation of the separate prior rights to water appropriation of the Finney County Water Users' Association and various owners of ditches for irrigation of land in the Arkansas valley in Kansas. The Finney County Water Users' Association claims that it has prior rights of appropriation, to the Colorado irrigators.

In the case of *Wyoming v. Colorado*, 259 U. S. 419, 66 L. Ed. 999, the state of Wyoming brough an original suit in this court against the state of Colorado, the Greely-Poudre Irrigation District and the Laramie-Poudre Reservoirs and Irrigation Company, the last two named defendants being corporations of Colorado. Wyoming charged that the two Colorado corporations, under the asserted authority and the permission of Colorado, were proceeding to divert in Colorado a large portion of the water of the Laramie river, which river had its source in Colorado and flowed into Wyoming and there joined the North Platte river; and that this attempted diversion was to be made to another water shed in Colorado for the use of irrigating lands in such other water shed.

The answers of Colorado asserted that Colorado as a state had a right to authorize this diversion without regard to the prejudice

that it might work to Wyoming and its citizens, that Colorado was entitled to an equitable division of the water of the river and that the proposed diversion, together with all subsisting appropriations in Colorado, did not exceed her share, and that after the proposed diversion, there would be left in the Laramie river and its tributaries in Wyoming, sufficient water to satisfy all appropriations in that state whose origin was prior in time to the effective inception of the right under which the proposed Colorado diversion was about to be made. 259 U. S. l. c. 455-457.

In that case there was no controversy as to priorities between an appropriator or appropriators in Wyoming and the two corporations of Colorado operating in that state. It was plain that the appropriations by the Wyoming irrigators had been made before the beginning of the operations complained of in Colorado. So far as the appropriators in Wyoming were concerned their interests were of a common and general kind as against the proposed diversion of the water of the Laramie river in Colorado and for that reason their interests could have been properly represented by Wyoming and they could, therefore, be bound by the decree in the case.

In the case at bar, as above stated, there is no such common question as between the Finney County Water Users' Association and the other Kansas irrigators, on the one hand, and the Colorado irrigators on the other hand, but there are many different questions of private priorities upon varying facts.

For the reasons suggested, we submit that the order should be made which is prayed for in the motion and which was also asked in the prayer of the answers for the state of Kansas and the Finney County Water Users' Association, and the Colorado irrigators should be required and notified either to file in this Court a document of authorization for Colorado to represent them, stating that they will

be bound by the orders and decrees therein, or else they should be made parties to this suit and subpoenas in chancery be issued accordingly against them to bring them in as parties defendant.

Respectfully submitted,

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